BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDALL L. WHITSON Claimant VS. **THE BOEING COMPANY** Respondent AND **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA n/k/a BROADSPIRE SERVICES** Insurance Carrier	)	Docket No. 1,024,229

ORDER

Respondent and its insurance carrier (respondent) requested review of the December 7, 2006, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on February 16, 2007.

APPEARANCES

John L. Carmichael, of Wichita, Kansas, appeared for claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) adopted the opinions of Dr. C. Reiff Brown, since he used the AMA *Guides*[1] to compute claimant's functional impairment and because his restrictions were more realistic than those of Dr. David Gwyn. Accordingly, the ALJ found that claimant had a 17 percent functional impairment to the body as a whole. The ALJ also found that claimant had a 50 percent task loss and a 55 percent wage loss for a 52.5 percent work disability.[2] In addition, the ALJ determined that respondent was not entitled to a credit for withdrawals claimant made from his 401(k) account.

Respondent argues that claimant should be limited to his functional disability. Respondent asserts that Dr. Gwyn's opinion is the only credible evidence pertaining to the nature and extent of claimant's disability and that Dr. Gwyn rated claimant as having a 6 percent functional impairment to the body as a whole. Dr. Gwyn also did not impose any permanent restrictions on claimant and, therefore, claimant has no work disability.

Claimant asserts that the ALJ correctly found that Dr. Brown's opinions were more credible than those of Dr. Gwyn. Claimant argues, however, that since he can no longer perform 95 percent of the job he was performing at the time of his injury, his task loss should be 95 percent rather than 50 percent. A 95 percent task loss and a 55 percent wage loss would compute to a 75 percent work disability. Claimant also contends that the ALJ was correct in finding that respondent is not entitled to an offset for withdrawals he made from his 401(k) account.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent almost 22 years, 17 of which he worked as a computer analyst. Claimant said he spent 95 percent of his day operating a computer and 5 percent of his day talking to other computer programmers. He was laid off from respondent, with his last day of work being June 17, 2005. When he was laid off from respondent, he continued to receive a check for 21 weeks as part of his severance pay. The parties have stipulated that his preinjury average weekly wage (AWW) with fringe benefits was $1,247.45.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] The ALJ, however, erroneously used 50.5 percent instead of 52.5 percent in his permanent partial disability award calculation.

About five to ten years before claimant was laid off, he started having problems with his upper extremities and shoulders. He notified respondent about the problem, and an ergonomic person evaluated his work station. He was given splints by his personal physician and wore the splints for about a year. Respondent sent him to Dr. Steven Hughes, and Dr. Hughes sent him to Dr. Gwyn. Dr. Gwyn ordered nerve conduction studies and operated on claimant's left carpal tunnel syndrome on September 1, 2005, and on his right carpal tunnel syndrome on October 20, 2005. Dr. Gwyn released him on January 9, 2006.

Claimant said he began looking for work even before his release date and started working on February 27, 2006, at Dustrol in Towanda, Kansas, as a dump truck driver. His starting wage was $10.50 per hour, and he now earns $13.90 per hour. Dustrol is a paving company, and he does not work when the weather is bad. When he first started he was working 20 to 40 hours a week. In the summer he worked 60 to 70 hours a week. In fall, he worked about 40 hours a week. He was told that in January, February, and sometimes March, Dustrol employees are laid off until the work picks back up. He receives no fringe benefits.

Dr. Gwyn released claimant with no restrictions, but he did get restrictions from Dr. Brown. He does not believe he is violating any of Dr. Brown's restrictions in his current job and has not noticed any aggravation of his condition from driving the dump truck.

Claimant states he has not been able to sit down at a computer for more than an hour or two since he left respondent. He still has problems with his elbows and some numbness in his hands, especially if he does a lot of driving and sometimes at night. He complains he no longer has much grip strength.

Dr. Gwyn is a board certified orthopedic surgeon. He first saw claimant on July 25, 2005, after claimant was referred to him by Dr. Hughes. Claimant reported to him that for the past five or six years he had numbness, pain, swelling and tingling mainly in the thumb, index and long finger of his right hand and in the small and ring finger on his left hand. Although claimant's examination findings were unremarkable on that visit, Dr. Gwyn believed he had possible carpal tunnel syndrome and cubital tunnel syndrome. He ordered a nerve conduction study and an EMG to evaluate claimant's symptoms further. That testing showed claimant had severe bilateral carpal tunnel syndrome.

Dr. Gwyn discussed with claimant the option of treating his condition with steroid injections, but claimant wanted to proceed with surgery. A right carpal tunnel release procedure was performed on September 1, 2005, and Dr. Gwyn also performed a left carpal tunnel release on claimant on October 20, 2005. Claimant told him he had significant relief of his paresthesias after his surgeries. On January 9, 2006, claimant stated he had no numbness or tingling and had good range of motion. Claimant was still having some soreness in his palm with heavy activities but otherwise was doing well. Dr. Gwyn released him from treatment on January 9, 2006, with no restrictions.

Dr. Gwyn rated claimant as having a 5 percent impairment to each upper extremity which converted to a total whole person impairment of 6 percent. He testified that he did not reference the AMA *Guides* when he provided an impairment rating of 5 percent to each upper extremity. His report of March 31, 2006, however, stated he based his rating "in accordance with the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, as well as within a reasonable degree of medical probability. . . ."[3] He did not believe that claimant was in need of permanent restrictions. He thought that claimant would be able to operate a computer to analyze programs as well as talk to computer programmers and, therefore, had no task loss. Dr. Gwyn did not measure claimant's grip strength when he released him. He said he would be surprised to hear that claimant testified he still had pain, swelling and lack of grip strength in his hands.

Claimant was examined by Dr. Brown, a retired board certified orthopedic surgeon, on February 15, 2006, at the request of claimant's attorney. Claimant gave a history of his condition and told Dr. Brown that he now only occasionally has nighttime paresthesias that awaken him at night. He stated he no longer has numbness in his hands, although he has some grip strength weakness. The tenderness over the flexor aspect of the wrists and the numbness and discomfort when using his hands has subsided. Claimant told Dr. Brown he continues to have pain in both elbows and shoulders and crunching and grinding in his right shoulder.

Upon examining claimant, Dr. Brown found no tenderness in claimant's wrists. There was tenderness over claimant's lateral humeral epicondyles and over the front of both shoulders, most noticeably on the right. Crepitus was present on the right when claimant moved his shoulders. Range of motion of the shoulders was limited. The acromial impingement sign was weakly positive on the right but negative on the left. Dr. Brown opined that claimant had developed bilateral carpal tunnel syndrome, bilateral lateral humeral epicondylitis, and bilateral rotator cuff tendinitis as a result of his work activity.

Dr. Brown found that claimant had a 10 percent impairment of each upper extremity on the basis of his carpal tunnel residuals, a 1 percent additional impairment of each upper extremity on the basis of his lateral humeral epicondylitis, a 10 percent impairment of his right upper extremity on the basis of loss of range of motion, a 6 percent impairment of his right upper extremity for crepitus, and a 3 percent impairment of the left upper extremity on the basis of loss of range of motion. Those converted and combined to total a 17 percent permanent partial impairment of function to the body as a whole.

Dr. Brown recommended that claimant avoid frequent use of keyboards, frequent flexion and extension of the wrists, frequent grasp-type activities, and use of vibrating tools. Claimant should avoid work that could cause him to frequently bump the lateral aspect of

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[3] Gwyn Depo., Ex. 2 at 33.

his elbows. He should avoid frequent lifting with the hands in a position of pronation, use of the hands above shoulder level, and reaching away from the body more than 18 inches. He should not lift above shoulder level, and lifting between the waist and chest level should be limited to 30 pounds occasionally and 20 pounds frequently.

Dr. Brown felt that claimant should not return to work as a computer analyst, as there is a 15 percent recurrence rate of operated carpal tunnel syndrome and almost always those are the people who have returned to the work that precipitated the condition in the first place. He believed that claimant could perform the job of dump truck driver within his restrictions. Dr. Brown reviewed the task list prepared by Jerry Hardin and opined that claimant could perform one of the two tasks on the list, for a 50 percent task loss.

Jerry Hardin, a human resource consultant, met with claimant on March 13, 2006, at the request of claimant's attorney. Together they assembled a list of the tasks claimant performed in the 15-year period before his work-related injury. Claimant worked only for respondent during that period of time, and his task list consisted of two tasks, operating a computer to analyze programs and talking to computer programmers and users about problems and changes. Claimant operated a computer 95 percent of his working day and spent 5 percent of his time talking with computer programmers and users.

It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[4] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[5]

Mr. Hardin testified that using a preinjury AWW of $1,247.45 and a post-injury AWW of $556 ($13.90 x 40 hours), claimant would have a 55 percent wage loss. Mr. Hardin opined that in claimant's job with Dustrol, he would have varying wages due to its seasonal type of work. Mr. Hardin believed, however, that claimant would average about 40 hours a week during the year.

Because of the seasonal and weather related variations in claimant's work at Dustrol, the ALJ used 40 hours a week as the basis for determining claimant's actual wage loss post-accident. The Board agrees that the ALJ's approach was reasonable under the facts of this case and affirms the finding of a 55 percent wage loss.

There is no argument that claimant failed to make a good faith effort to find appropriate employment post injury. So the only issue concerning claimant's entitlement

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[4] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

to a work disability is whether Dr. Brown's restrictions were reasonable and necessary or whether, instead, claimant requires no work restrictions as opined by Dr. Gwyn. The Board agrees with the ALJ that Dr. Brown's opinion is the more credible. It is reasonable to restrict claimant from returning to the same repetitive activities that caused his injuries. Furthermore, Dr. Gwyn seemed to focus his opinions on the condition for which he performed surgery without regard for claimant's other symptoms, whereas Dr. Brown considered all of claimant's work-related injuries. K.S.A. 44-510e(a) appears to contemplate a straight mathematical formula for determining wage and task loss for purposes of arriving at a claimant's work disability percentage. Accordingly, the Board will not time-weight the tasks. The Board affirms the ALJ's finding of a 50 percent task loss. The Board likewise affirms the ALJ's finding that claimant has a 17 percent functional impairment.

In its application for review, respondent listed as an issue the ALJ's denial of allowing respondent an offset for withdrawals claimant made from his 401(k) plan. This issue was not listed as an issue in respondent's brief, which stated: "The only issue for the Board's determination is the nature and extent of claimant's disability."[6] Nevertheless, respondent's brief does contain this argument:

> Should the Board find that claimant is entitled to a work disability, respondent is entitled to a credit for its contributions to claimant's withdrawals from his 401K retirement account at [respondent]. These total Twenty-Three Thousand Two Hundred Seventy-Eight Dollars and Ninety-Three Cents ($23,278.93).[7]

However, at oral argument before the Board, counsel for respondent conceded that the value of the employer's contributions for the distribution made after the ending date for claimant's series of injuries were $1,849.17 and $3,429.76, which total $5,278.93. Respondent argues that this sum should be prorated over the period of the permanent partial disability compensation but should not be applied against the award if it is limited to claimant's percentage of functional impairment only. Also, respondent would only apply the retirement offset against an award of work disability after the equivalent number of weeks of compensation corresponding to the percentage of functional impairment had been fully paid.

Robert Clinton, benefits administrator for respondent, is responsible for providing oversight on benefit plans, specifically 401(k) and other qualified retirement plans for respondent. He testified that respondent's 401(k) plans are funded through employee contributions and respondent matches those employee contributions.

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[6] Brief on Behalf of Respondent and Insurance Carrier at 1 (filed Jan. 10, 2007).

[7] *Id*. at 3.

In May 2003, while claimant was still working for respondent, he withdrew $18,000 from his 401(k). Claimant testified that he rolled this sum over into another plan. In July 2005, after his lay-off, he received a distribution from his account in the lump sum of $25,637.32. At that time, claimant had an outstanding loan that was defaulted in the amount of $5,879.27. The May 2003 withdrawal of $18,000 was from company-matching contributions. Of the July 2005 distribution, the value of the employee contributions was $23,788.15 and the company match contributions was $1,849.17. Of the loan default, the balance attributable to employee contributions was $2,449.51, and the company match contributions was $3,429.76. While claimant was employed at respondent, he took a loan from his Voluntary Investment Plan. When claimant closed the balance of his account, the loan became immediately defaulted and was treated as a taxable distribution.

Claimant argues:

> Judge Clark correctly found that the 401(k) benefits which claimant received were not retirement benefits. The first withdrawal in the amount of $18,000.00 was made by claimant in 2003, two years prior to claimant's medical layoff. Judge Clark correctly found that that withdrawal clearly did not represent a withdrawal of retirement benefits which could be used to offset work disability benefits. Judge Clark also correctly found that the remaining withdrawals of company-matched contributions in the amount of $1,879.17 and $3,429.76 taken on July 5, 2005 were not received by claimant contemporaneous with the receipt of work disability benefits and, therefore, no credit should be allowed. Claimant is not currently receiving any retirement benefits. He has not received any retirement benefits contemporaneous with the receipt of work disability benefits. No credit should be allowed.[8]

Although a retirement offset was not listed as an issue in the ALJ's Award, it was nevertheless addressed. The ALJ found that as of the date of the regular hearing, claimant was 50 years old and was not retired and was not receiving any retirement benefits. Accordingly, he denied respondent's request for an offset pursuant to K.S.A. 44-501(h).

K.S.A. 44-501(h) reads:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers

[8] Claimant's Brief at 4 (filed Jan. 16, 2007).

> compensation benefit payable for the employee's percentage of functional impairment.

Unfortunately, the statute provides little or no guidance for dealing with lump sum distributions. In *Lleras*,[9] the Board held that such distributions were intended as a lifetime benefit and converted the lump sum to a weekly equivalent utilizing claimant's life expectancy. However, in this case, unlike in *Lleras*, the parties did not place a mortality table into evidence. Moreover, although respondent made a distribution of the account upon claimant's termination, the record is unclear whether claimant rolled over all or any part of that distribution into a qualified IRA. Claimant indicated that he rolled all of his benefits over to a different plan. If he did, then claimant may not have received a retirement distribution. And even if he had, the record does not reflect what penalty claimant may have had to pay to receive a distribution at his age. The statute is silent as to whether the retirement offset should be applied to the gross or the net distribution under such circumstances. Claimant said that he never paid any early withdrawal penalties.

Mr. Clinton, respondent's benefits administrator, said that respondent's voluntary investment plan was a qualified retirement plan pursuant to IRS regulations. He also said that the plan can be funded through either a deferred compensation election or by after-tax contributions. He did not say, however, which method claimant used to fund his account. The record does not establish if all or part of the distributions at claimant's age and under either circumstance would be a retirement benefit as contemplated by the statute or, instead, simply regular income to the claimant. The Board concludes that respondent has failed to prove that claimant received or "is receiving" retirement benefits. Accordingly, the ALJ's denial of a retirement offset is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated December 7, 2006, should be modified to correctly calculate the 52.5 percent permanent partial disability compensation award but is otherwise affirmed.

Claimant is entitled to 217.88 weeks of permanent partial disability compensation at the rate of $449 per week or $97,828.12 for a 52.5 percent work disability, making a total award of $97,828.12.

As of February 28, 2007, there would be due and owing to the claimant 88.71 weeks of permanent partial disability compensation at the rate of $449 per week in the sum of

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[9] *Lleras v. Via Christi Regional Medical Center*, No. 5,008,471, 2005 WL 3665502 (Kan. WCAB Dec. 22, 2005).

$39,830.79 for a total due and owing of $39,830.79, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $57,997.33 shall be paid at the rate of $449 per week for 129.17 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

I agree with the majority that K.S.A. 44-501(h) does not apply in this instance.

First, the wording of K.S.A. 44-501(h) indicates the statute only applies to retirement benefits that are being paid on an ongoing basis. Lump sum payments are not addressed by the statute as indicated by the language that the credit is applicable when a worker "is receiving" retirement benefits. After a lump sum amount has been paid, the worker is no longer "receiving" those benefits. In that respect, the statute is clear and unambiguous. Common English usage should not be ignored in interpreting legislative intent.

> "[W]hen a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction." [Citation omitted.] "When determining whether a statute is open to construction, or in construing a statute, *ordinary words are to be given their ordinary meaning, and courts are not justified in disregarding the unambiguous meaning*." [Citation omitted.]

> When reviewing questions of law, a court may substitute its opinion for that of the administrative agency. [Citation omitted.] Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. [Citations omitted.] The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature. [Citation omitted.][10]

Second, without engaging in sheer speculation, it is not possible to convert a lump sum payment of benefits to a projected weekly equivalent. The statute does not address whether one would start with the gross amount of a lump sum payment or the net amount after taxes and penalties. Nor does the statute address how the weekly equivalent is to be determined. Should the projected weekly amount be based upon the annuity that could be purchased with the lump sum amount? Or should it be determined using an estimated weekly cash flow that could be generated by the lump sum when utilizing some capitalization rate? Moreover, the statute fails to indicate what weekly period the amount is to be projected. Should it be computed over the life expectancy of the injured worker or do we also consider the life spans of the other potential beneficiaries as provided by the plan or the other potential payout options that the retirement plan provided? Finally, the statute does not address how to treat funds that are rolled over into other retirement plans or individual retirement accounts.

K.S.A. 44-501(h) does not address the method to convert lump sum payments to a projected weekly equivalent, which indicates the legislature did not intend for those types of payments to reduce a worker's permanent disability benefits. But assuming that conclusion is wrong, there would still be no credit in the event of lump sum payments as it not possible to calculate without engaging in sheer speculation.

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BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[10] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 980-981, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).